Nos. 20256 - 20257

In the United States Court of Appeals For the Ninth Circuit

WARREN HAZEN and MAXINE HAZEN, husband and wife, and WARREN W. HAZEN, Administrator of the Estate of Antoinette Marie Hazen, deceased, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

JASPER E. TODD, *Appellant*,

vs.

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BRIEF OF APPELLANTS

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

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JURISDICTION

These actions, consolidated in the District Court (R. 21-22) and in this court, were instituted under the Federal Tort Claims Act, 28 USC 1346 (b), 2671, et seq., which grants jurisdiction to the District Courts. After trial, judgments denying both claims were entered (R. 32-33) and immediately thereafter appellants filed timely Notice of Appeal (R. 34-36) and Bond on Appeal pursuant to stipulation (R. 38-39). Jurisdiction of this court is based on 28 USC 1291.

STATEMENT OF THE CASE

Through the Bureau of Indian Affairs, Department of Interior, the appellee operates the Wapato Irrigation Project, located in the central and southern portions of the Yakima Valley in the State of Washington. Immediate control of the project is under a project engineer, Mr. J. Y. Christiansen, who, with his assistant, Mr. Taylor, has charge of several watermasters, each of whom controls a district within the Project and has control over several ditchriders, who personally inspect the ditches, turn the headgates, etc. Over-all control is vested in the Bureau of Indian Affairs as the Project embraces the Yakima Indian Reservation.

Under the several acts of Congress, as amended, (See Appendix A) the government ditch easements permit the construction and operation of canals and ditches to transmit irrigation water and impose upon the government the obligation to clean and maintain said ditches. Pursuant thereto, the Project has a maintenance program which in a very general way includes control of brush and weeds along the ditch banks. (R. Tr. 194, 208, 282, 298).

One of the weeds growing in abundance along the ditch in question is water hemlock, sometimes called "wild parsnip" (R. 187). This weed is described in various government publications as "probably the most poisonous plant in the United States"; "probably the most violently poisonous of the plants in the temperate regions"; and "records show that a pea-sized bite of

the root will kill a man." (Exhibits 13A, D, E, F, G, L). There is no known antidote (R. Tr. 78).

Despite knowledge by each of the employees concerned in this case, of the extremely toxic properties of this plant (R. Tr. 179-82, Baugher, Ditchrider; 205, Bruner, Watermaster; 276-77, Taylor, Assistant Project Engineer; 297, Christiansen, Project Engineer) and of the propensity of children of tender years to play in and about the ditches (R. 8, 18; R. Tr. 183), no specific program was directed to the control of this weed. (R. Tr. 184, 187, 280, 282, 298). No such program was even discussed prior to the tragic events in question (R. Tr. 283, 303).

On or about March 7, 1963, the Project employees were cleaning a section of ditch along the road known as "Lateral B" across from appellant Todd's property. The procedure was early trash burning of the brush on the ditch banks followed by vee-ing and discing, which process loosened and raised to the surface and exposed roots of various plant life including a substantion amount of water hemlock. (R. Tr. 22, 137, 139, 143, 172). The cleaning was done pursuant to the only maintenance program of the Project, which was aimed solely at facilitating the flow of water through the ditches, and none of the acts thereunder was done to control weeds. (R. Tr. 186, 191-94). There was no weed control program aimed at any particular weeds as such. (R. Tr. 194, 280, 282, 298).

On March 9, 1963, children of the appellant Todd

were playing "house" on the Todd property bordered in close proximity by the ditch in question. (R. Tr. 13-14, 20-21). In their company was Antoinette Hazen, age 9, daughter of appellant Hazen. The children procured several water hemlock roots which had been exposed by the recent cleaning activities on the ditch and proceeded to chew and swallow portions of these roots. (R. Tr. 57-59). Thus resulted the death of the Hazen girl (R. Tr. 66-68) and the injuries to the Todd boy (R. Tr. 16-19) which form the basis of these actions.

In rendering judgment against the appellants, the District Court found that the government was negligent but that such negligence occurred in the exercise or failure to exercise a discretionary function within 28 USC 2680 (a) granting immunity. (R. Tr. 31).

SPECIFICATION OF ERRORS

1. The District Court erred in making Finding of Fact No. 15 (R. Tr. 29) reading as follows:

> "The policy of weed control, extermination and method of ditch maintenance from the Wapato Irrigation Project was determined by the Project Engineer, Mr. J. Y. Christiansen."

in that there was no policy of weed control extermination either generally or aimed specifically at water hemlock, except the general maintenance policy of cleaning the ditches of any impediment to the flow of irrigation water therein. (R. Tr. 186, 191-92, 194, 262, 280, 282, 298).

2. The District Court erred in making Finding of Fact No. 17 (R. Tr. 30) reading as follows:

> "Under the Project program ditches were burned or vee-ed and the berm therefrom disced in the winter or spring. In adidtion to this, they were from time to time mowed, burned or sprayed. There was a practice of applying 2,4-D or other appropriate chemicals, but a part of the policy was not to spray with 2,4-D near orchards or vineyards because of the risk of damage thereto unless the permission and consent of the owner was first obtained,"

in that so far as the word "program" might be construed to imply a weed control program it is erroneous for the reasons set forth in Specification of Error No. 1.

3. The District Court erred in making Finding of Fact No. 19, (R. Tr. 30), reading as follows:

> "The maintenance crew of the defendant followed the directions of their supervisors and they used ordinary care in the execution of these directions from the supervisor regarding weed control, and their maintenance of said ditch and activity did not deviate from the method of maintenance determined by the Project Engineer,"

in that the maintenance crew was negligent in exposing the water hemlock roots on the ditch in question and in failing to bury, remove, or warn of their presence. (R. Tr. 23, 40, 65, 137, 139, 143, 172.)

4. The District Court erred in entering Conclusion of Law No. 4 (R. Tr. 31) reading as follows:

> "The court finds that the defendants, under the circumstances existing, were guilty of negligence but that because said negligence occurred in the exercise of discretionary function within 28 U.S.C. A 2680 (a), the defendant is immune from such negligence,"

in that such negligence was not the exercise or failure to exercise a discretionary function and, if any discretion was involved, the same occurred on the operational level and is therefore not a proper basis for granting immunity.

SUMMARY OF ARGUMENT

Appellants contend that the negligence of the employees of appellee was not the result of discretionary function within 28 USC 2680 as the same occurred at the operational rather than at the planning level *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953); *United States v. Hunsucker*, 314 F. 2d 98 (9th Cir. 1962). This includes both negligence on the part of the immediate supervisory personnel of the Project in failing to attempt any control of water hemlock or to warn of its dangers and on the part of the maintenance crew in discing the ditch in question and leaving exposed the deadly roots.

ARGUMENT

28 USC 2680 (a) provides, inter alia:

> "The provisions of this chapter and Section No. 1346 (b) of this title shall not apply to
> (a) Any claim based upon an act or omission of an employee of the Government exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid, *or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.*" (Emphasis added).

The primary question in this case is whether the above statute furnishes the government a defense. We contend that it does not.

The statute itself contains no definition of "discretion" but the term has often been construed by the courts. The cornerstone case is *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953), the "Texas City Disaster" case arising out of the explosion of ammonium nitrate fertilizer. A 4-3 court held that the immunity statute was applicable as the

> ". . . decisions held culpable were all responsibly made at a planning rather than operation level and involved considerations more or less important to the practicability of the Government's fertilizer program." (346 U.S. at 42, 73 S. Ct. at 971, 97 L. Ed. at 1427).

Discretion in *Dalehite* covered the cabinet level decision to institute the fertilizer program and the plans and specifications established pursuant thereto.

Dalehite was followed by *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955), a 5-4 opinion, written by one of the dissenters in *Dalehite*. This case involved alleged negligence of the Coast Guard in failing to maintain a lighthouse, causing the plaintiff's barge to run aground. The court squarely rejected the governmental versus proprietary implications of *Dalehite* and referred to the aim of the Tort Claims Act as follows:

> "The broad and just purpose which the statute was designed to effect was to compensate the victims of

> negligence in the conduct of governmental activities and circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constiuted guardian of the Treasury import immunity back into a statute designed to limit it." (350 U.S. at 68, 76 S. Ct. at 126, 100 L. Ed. at 48).

Indian Towing was followed by and approved in *Rayonier, Inc. v. United States*, 352 U.S. 315, 77 S. Ct. 374, 1 L. Ed. 2d 354 (1957), a 7-2 opinion written by another of the dissenters in *Dalehite.*

Although not directly involved in *Indian Towing*, (because the government conceded the point), the operational-planning level distinction has been adopted by several courts, and consistently by the Ninth Circuit.

This court considered the applicability of the discretionary function exception in the *United States v. Ure*, 225 F. 2d 709, (9th Cir. 1955). There, negligence was predicated on the failure of the Reclamation Service to completely line an irrigation canal with concrete. This court found that there was no negligence in fact on the part of the government and that, in any event, the failure to line the canal fell within the scope of the discretionary function. Then came *United States v. Hunsucker*, 314 F. 2d 98 (9th Cir. 1962), wherein the plaintiffs asserted negligence against the United States in the construction and maintenance of a drainage and

sewage system which flooded their property. The construction was undertaken in connection with the reactivation of Oxnard AFB, and the government contended that the discretionary function applied. This court held otherwise, as follows:

> ". . . it is clear that the decision to reactivate Oxnard Air Force Base was made on the 'planning level'. The directive authorizing construction on the base, however, was very general in its terms and did not specifically authorize the acts and omissions that formed the basis of appellees' complaint. Further, from the evidence presented, it does not appear that these acts and omissions were a necessary part of the reactivation. After a careful examination of the record, we feel that on the basis of the evidence presented in this case, it would not be consonant with the purposes of the Tort Claims Act to conclude that the government was immunized from all liability for its failure to take reasonable precautions to prevent damage to appellees' land." (314 F. 2d at 105).

The court relied on and quoted from *American Exchange Bank of Madison, Wis. v. United States*, 257 F. 2d 938, (7th Cir. 1958) as follows: (314 F. 2d at 105)

> "Undoubtedly there was an exercise of discretion in deciding whether and where a post office building should be located in Madison, Wisconsin, but whether a handrail should be installed as a safety measure on wide stone steps involves action at the operational level which would seem to involve no more discretion than fixing a sidewalk on post office grounds that might be in need of repair.
>
> "In the light of the pronouncements of the Supreme Court, and considering the trend of the courts to construe broadly the waiver of immunity provisions of the Tort Claims Act, we hold that the trial court was in error in holding that whether handrails

should be installed was a discretionary function." (257 F. 2d at 941).

It is fairly evident that even in the above cases, discretion was involved. One is rather sorely pressed to think of any act that does not involve some element of discretion unless it be a purely reflex action. Something more than discretion alone is necessary to support the statutory defense and it appears that only such discretion as is exercised on a policy level will result in immunity. Policy decisions have been held to include reactivation of an Air Force Base. (*Hunsucker v. United States, supra*); to change the course of the Missouri River (*Coates v. United States*, 181 F. 2d 816, (8th Cir. 1950); whether and where to build a post office building (*American Exchange Bank of Madison, Wis. v. United States, supra*); whether mental patients at veterans hospitals should be allowed maximum freedom (*White v. United States*, 317 F. 2d 13 (4th Cir. 1963); *Fair v. United States*, 234 F. 2d 288, (5th Cir. 1956); the decision to mark a wrecked ship (*Somerset Seafood Co. v. United States*, 193 F. 2d 631 (4th Cir. 1951); and whether or not to operate a light house (*Indian Towing Co. v. United States, supra*). All of such decisions involved questions of policy and the evaluation of several factors such as financial, political, economic, social, and so on. They are generally broad, over-all decisions, usually of a "whether-or-not" category.

The "how-to-do-it" decisions on the other hand, are usually characterized as operational and, although

they may involve discretion, they are less broad and involve fewer policy factors, if any. For example, the decision to make low-level plane flights to make a survey (*Dahlstrom v. United States*, 228 F. 2d 819 (8th Cir. 1956); the operation of an air traffic control tower (*Eastern Airlines v. Union Trust Co.*, 221 F. 2d 62 (App. D.C. 1955); whether to install a hand rail on a post office building (*American Exchange Bank of Madison, Wis. v. United States, supra*); the design and installation of a "fail-safe" airplane elevator mechanism (*Swanson v. United States*, 229 F. Supp. 217 (D.C. Cal. 1964); all afforded the government no immunity under 28 USC 2680. We contend that the instant case falls into this category.

The uncontroverted facts in this case are that the government employees knew of the extremely toxic properties of water hemlock (R. Tr. 179-82, 205, 276-77, 297); knew that it grew in profusion on the ditch banks in question (R. Tr. 187) and also knew that small children often played in and around the Project ditches. (R. 8, 18; R. Tr. 183). Yet the Project Engineer and his subordinates had no program aimed at control of this deadly plant, other than to control it like any other weed, and only then with the sole and exclusive purpose of keeping the ditches open (R. Tr. 184, 187, 280, 282, 298). Although part of the Project maintenance program consisted of spraying the ditch banks with 2,4-D, a recognized control for water hemlock, (R. Tr. 203) the area in question was not so sprayed.

The policy of the project was not to spray near orchards without the consent of the land owner, but he would have consented to spraying the area in question, had he been asked. He never was. (R. 30; R. Tr. 232-35). Further, the government never warned any of the residents along the ditch banks about this very toxic plant, even after the roots had been exposed and allowed to so remain. (R. Tr. 15, 23, 40, 64.) Quite correctly, the District Court found the government negligent, although it granted immunity under the discretionary function theory. This was error for even assuming discretion was involved, which it was not; it was on the operational level.

The lack of a program concerning water hemlock was not the result of a considered policy decision, for even the Project Engineer admitted that no such program had ever been discussed prior to the death of the Hazen girl. (R. Tr. 303). We contend that such failure to consider any measures at all is itself negligence.

We fail to see how the negligent operation of the Wapato Irrigation Project differs from the negligent operation of an air traffic control tower (*Eastern Airlines v. Union Trust Co.*, 221 F. 2d 62 (App. D.C. 1955); from the negligent maintenance of the Capitol building (*McNamara v. United States*, 199 F. Supp. 879 (D.C. D.C. 1961); from the negligent design or installation of airplane modifications (*Swanson v. United States*, 229 F. Supp. 217 (D.C. Cal. 1964); from the negligent operation of a veterans' hospital

(*White v. United States*, 317 F. 2d 13 (4th Cir. 1963); from the negligent failure to furnish a handrail on a post office building (*American Exchange Bank of Madison, Wis. v. United States*, 257 F. 2d 938 (7th Cir. 1958); or from the negligent design and operation of a drainage system on an air force base (*United States v. Hunsucker*, 314 F. 2d 98 (9th Cir. 1962); all of which impose liability not immunized by 28 USC 2680.

In the instant case there was no "high level" decision made after mature deliberation and consideration of cost, economics, finances, or other pros and cons. There was only a vacuum in which nothing was done or even thought about, just as in *Hunsucker* there was no consideration given to the possible flooding of the neighboring premises. Just as the directive order authorizing construction in *Hunsucker* was very broad and did not mention the acts and omissions complained of, so, too, here is the enabling legislation very general and without reference to the negligent omissions of the Wapato Project personnel. Further, in *Hunsucker*, the drainage and sewage problems were characterized by the court as not "a necessary part of the reactivation" of the Air Force Base (314 F. 2d at 105) and the same holds true for the acts and omissions under discussion in this case. Just as the policy decision to reactivate the base was distinguished by this court from the negligent manner in which the same was carried out, we distinguish the policy decision to operate the Wapato Irriga-

tion Project from the negligent acts and omissions in doing so.

In short, by virtue of the above case authority and the recognized trend to broaden the waiver of governmental immunity granted in the Tort Claims Act, we respectfully submit the District Court erred in freeing the government from liability under 28 USC 2680.

We also submit that the District Court erred in holding that the maintenance crew that cleaned the ditch was not negligent in leaving exposed the deadly hemlock roots. Negligence, in Washington, is the failure to exercise reasonable care—the doing af an act or failing to act in contravention of what a reasonably prudent man would or would not do under the same circumstances. See, e.g. *System Tank Lines, Inc. v. Dixon*, 47 Wn. 2d 147, 286 P. 2d 704 (1955); *Thomas v. Casey*, 49 Wn. 2d 14, 297 P. 2d 614 (1956). Where the risk of harm is great, Washington law requires that the occupier of the premises take the utmost precaution to keep the premises in a safe condition. *Haugen v. Central Lutheran Church*, 58 Wn. 2d 166, 361 P. 2d 637 (1961); *Ward v. Thompson*, 57 Wn. 2d 655, 359 P. 2d 143 (1961). Bearing in mind the highly poisonous nature of the plant and the further fact that children of tender years were known to play in and about the ditch in question, all of which is uncontroverted, the conclusion is inescapable that the employees were negligent in leaving the roots exposed and readily accessible.

The District Court also found that the maintenance

crews followed the directions of their supervisors and did not deviate from those instructions (R. 30). Yet the record contains no mention of any instructions at all to the maintenance crew. The most that can be inferred from the record is that, perhaps, the crew was told to vee and disc the ditch in question. This, however, even assuming the same to be discretionary, affords appellee no defense for the veeing and discing was negligently done as above set forth. The cases are legion on this point and uniformly hold that once the discretion has been exercised, negligence in carrying the same out imposes liability. See, e.g. *Swanson v. United States*, 229 F. Supp. 217 (D.C. Cal. 1964) (discretion to decide to design a fail-safe airplane elevator mechanism but not in the negligent design thereof) ; *Somerset Seafood Co. v. United States*, 193 F. 2d 631 (4th Cir. 1951) (discretion to mark or not to mark a wrecked ship but not in negligently marking the same) ; *White v. United States*, 317 F. 2d. 13 (4th Cir. 1963) (discretion to determine policy of maximum freedom for mental patients at veterans' hospital but not in negligently allowing a particular patient such freedom) ; *Everitt v. United States*, 204 F. Supp. 20 (D.C. Texas 1962) (discretion to undertake harbor improvements but actionable negligence in failing to remove submerged pilings) ; *United States v. Gavagan*, 280 F. 2d 319 (5th Cir. 1960) (discretion whether to undertake maritime rescue but negligence in conducting the same imposes liability).

In this case if any discretion was exercised, it was not at the maintenance crew level. As the crew was negligent, so, too, was the appellee United States and the judgments dismissing appellants' claims ought therefore to be reversed.

CONCLUSION

Summarizing the above, there are two main points, either of which compels this court to reverse the District Court's judgment and to remand this case for a determination of damages. The facts are uncontroverted (except for damages which never were decided) and the questions posed are questions of law. Those facts establish that the appellee, through the Wapato Irrigation Project personnel was negligent in failing to control or attempt to control or warn of the deadly properties of water hemlock. Such negligence existed at the operational level and was not a policy decision affording appellee immunity under 28 USC 2680. Further, and even assuming the above was discretionary, the negligence of the maintenance crew in leaving exposed the water hemlock roots on the surface of the ditch banks where children were known to play, is not within the discretionary immunity provided by 28 USC 2680 and, in itself affords ample basis for imposing liability. Accordingly, we respectfully submit that this court should reverse the judgment of dismissal entered in the District Court and remand these consolidated cases for a determination of the amount of damages incurred by appellants.

Respectfully submitted,

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APPENDIX A

Selected Legislation re: Wapato Irrigation Project

25 CFR 200: Wapato Irrigation Project, Washington

§200.1 Organization:

> "The Wapato project shall be in charge of an engineer of the Bureau of Indian Affairs who is authorized to administer, carry out and enforce the regulations of this part, either directly or through project employees. The project engineer or his representative may refuse delivery of water to any water user or landowner who disregards or fails to comply with the regulations of this part. The project engineer is vested with authority to execute on behalf of the Secretary of the Interior water right applications by landowners of the project on the approved departmental form of application."

§200.2 Irrigation season.

> "Water will be available for irrigation purposes from April 1 to September 30 each year. These dates may be varied as much as 15 days when weather conditions *and the necessity for doing maintenance work seems to warrant doing so.*" (Emphasis added)

§200.4 (b) Delivery Point.

> "*The project will maintain canals, laterals and necessary appurtenances in proper condition to make deliveries of water at such elevation as is necessary to serve each farm unit by gravity flow . . .*" (Emphasis added)

§200.9 Right-of-way.

> "For use in the necessary activities and emergencies incident to the operation and maintenance of the irrigation system, there is reserved a right-of-way along all canals, laterals, sub-laterals and drains, in addition to the land actually occupied by such channels and their embankments, measured from the outside limits of the embankments or

channel, a strip of land of sufficient width on each side of said canals, laterals, sublaterals and drains to permit the operation of maintenance equipment, making repairs and improvements, and travel by the project ditchriders."

§200.12 Structures.

"(a) All necessary headgates, checks, drops, turnouts, flumes and measuring devices will be installed and maintained by the project . . ."

(The above regulations promulgated under authority of Sec. 1, 3, 36 Stat. 270, 272, as amended; 25 USC 381-90)

APPENDIX B

Exhibits

(Page numbers refer to Record of Trial)

Exhibit Number	Identified	Offered	Received
Pl: 1-10	10–12, 38–39	12	13
Pl: 11	45–46	85	85
Pl: 12	129	129	130
Pl: 13A	81–82	85	87
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Df: 20	35–36	36	36
Pl: 21	110	117	117
Pl: 22-39	110–14	114	116–17
Pl: 41	152–54	213	213

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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